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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

ALLIED HOLDINGS, INC., *et. al.*

Debtors.

CASE NOS. 05-12515 through 05-12526
and 05-12528 through 05-12537
Jointly Administered

CHAPTER 11

JUDGE MULLINS

ORDER

THIS MATTER is before the Court on Motion of Ad Hoc Committee of Equity Security Holders for an Order Compelling Allied to Convene Annual Shareholders' Meetings ("the Motion", Doc. No. 2393) filed by Virtus Capital LP, Hawk Opportunity Fund, LP, Aspen Advisors, LP, Sopris Capital Advisors, LLC, Armory Advisors, and Cypress Management Advisors LLC (collectively, the "Movants"). Allied Holdings, Inc. ("AHI") and its affiliated debtors and debtors-in-possession (collectively, the "Debtors") responded to the Motion (the "Response", Doc. No. 2488). The Court conducted a hearing on the Motion on February 14, 2007 (the "Hearing"). The parties filed post-hearing briefs.

The Movants seek an order compelling Debtors to convene annual shareholders' meetings for 2006 and 2007 for the purpose of electing directors for AHI. AHI's last shareholders' meeting was held on May 24, 2005. The Debtors commenced their Chapter 11 cases on July 31, 2005. According to the Motion, Virtus Capital Advisors LLC, an AHI shareholder, made written demand on November 14, 2006 that AHI hold an annual shareholders' meeting pursuant to Code Section 14-2-703 of the Official Code of Georgia Annotated (the "Georgia Code"). Debtors' counsel informed Movants' counsel that AHI planned to set a shareholders meeting in 2007 and that the timing of the meeting would be dependent on the time needed to complete the audit of AHI's financial statements for 2006 to ensure compliance with

the requirements of the Securities Exchange Commission (the "SEC") regarding proper notice to shareholders. As a result of what Movants considered to be an undue delay in scheduling the shareholders' meetings, Movants filed their Motion on January 11, 2007. In addition, Movants filed that certain Complaint for Judgment Compelling Allied Holdings, Inc. to Convene Shareholder Meeting (the "Complaint", Adv. Proc. No. 07-06021). On January 22, 2007, AHI's board of directors scheduled its annual shareholders' meeting for May 17, 2007.

This Court has jurisdiction over this Motion pursuant to 28 U.S.C. sections 157 and 1334. The Motion is a "core proceeding" within the meaning of 28 U.S.C. section 157(b)(2)(A), as it involves a matter "concerning the administration of the estate." Venue of this proceeding before this Court is proper pursuant to 28 U.S.C. sections 1408 and 1409. The relief sought by Movants in compelling shareholders' meetings is equitable in nature. Bankruptcy Rule 7001(7) provides that an adversary proceeding is necessary in order "to obtain an injunction or other equitable relief, except when a chapter 9, 11, 12, or 13 plan provides for the relief." Fed. R. Bankr. P. 7001. The failure to proceed by an adversary proceeding when seeking injunctive relief can constitute reversible error. In re Service Merchandise Co., 256 B.R. 755, 766 (Bankr. D. Tenn. 2000). "Despite the fact that an adversary proceeding is required for the injunctive relief sought by the debtors, courts in many instances [find] that judicial economy permits the courts to look beyond Rule 7001 to the merits of the dispute provided no prejudice will result." Id. at 765-66; see 10 Collier on Bankruptcy section 7001.08 (Lawrence P. King et al. eds., 15th ed. rev.). In this case, the parties' arguments presented at the Hearing and their subsequent requests to file post-hearing briefs appear to indicate a desire to have a Court ruling on the Motion. Further, there appears to be no resulting prejudice to Debtors caused by proceeding on the Motion, as the issue *sub judice* is solely a question of law. Thus, in the interest of judicial economy, the Court will address the merits of the Motion.

It is a "well-settled rule" that the right to compel a shareholders' meeting for the

purpose of electing a new board continues during reorganization proceedings. Manville Corp. v. Equity Sec. Holders Comm. (In re Johns-Manville Corp.), 801 F.2d 60, 64 (2d Cir. 1986). Under Georgia law, a court may “order a meeting to be held on application of a shareholder of the corporation if an annual meeting was not held within the earlier of six months after the end of the fiscal year of the corporation or 15 months after its last annual meeting.” Code section 14-2-703 of the Georgia Code. While Movants’ right to compel a shareholders’ meeting appears well-settled, the parties disagree whether audited financials are required prior to an annual shareholders meeting. AHI states in its post-hearing brief that it cannot hold its 2007 annual meeting to elect directors at an earlier date because SEC regulations require that shareholders be provided with the prior year’s audited financial statements at least twenty calendar days before the annual meeting and it does not expect its accountants to have completed the audit of its 2006 financial statements until April. In their own post-hearing brief, Movants reject the arguments made by Debtors and state that “caselaw clearly establishes that Allied can hold an annual shareholders’ meeting prior to the completion of its audited financial statements if this Court so orders.”

The parties agree that SEC regulations require that a corporation that solicits proxies from shareholders must send an annual report with each proxy statement, and that the annual report must include, *inter alia*, audited financial statements for each of the three most recent fiscal years. 17 C.F.R. section 240.14(a)-3 (2007). As provided in the SEC Telephone Interpretation Manual, the “most recent fiscal years” referenced in this rule are the most recent completed fiscal years as of the date of a company’s annual meeting, not as of the date a company mails proxy materials for its annual meeting.¹

Contrary to the arguments made by Movants, even in situations when debtors do

¹ Division of Corporate Finance; Manual of Publicly Available Telephone Interpretations: Supplement March 1999, 15 Rule 14a-3(b)(1) (1999), *available at* <http://www.sec.gov/interp/telephone/phonesupplement1.htm>.

not solicit proxies, SEC regulations require that every shareholder who is entitled to vote receive information substantially similar to that found in a financial statement at least twenty calendar days before an annual meeting. 17 C.F.R. section 240.14(c)-2 (2007). Further, if this information statement relates to an annual meeting of security holders at which directors are to be elected, the “Regulation 14C rules” require the information statement provided to each shareholder is to be accompanied or preceded by an annual report containing the information specified in section 240.14(a)-3, the provision regulating the information to be provided in connection with a proxy statement. 17 C.F.R. section 240.14(c)-3 (2007); Newcastle Ptnrs., L.P. v. Vesta Ins. Group, Inc., 887 A.2d 975, 981 (Del. Ch. 2005)(stating that section 14(c) requires substantially the same filings for meetings at which no proxies are solicited as the SEC required for meetings with solicitations).

The reliance that Movants put on Newcastle Partners for the proposition that a registered company can convene annual shareholders’ meetings without first disseminating a proxy statement or an information statement is misplaced with respect to this case at this time. In Newcastle Partners, Delaware’s Court of Chancery denied debtor’s motion for relief from the court’s previous order directing debtor to hold its annual shareholders’ meeting. Newcastle Ptnrs., L.P., 887 A.2d at 982. The court allowed debtor ninety (90) days to hold the meeting to complete its financial reports thus allowing debtor “to make the necessary SEC filings to permit management to solicit proxies at the mandated meeting.” Id. at 977. However, after the 90 days had elapsed, the debtor still had not conducted a meeting. Concerned that a shareholder meeting would be “indefinitely delayed” and finding that it was “unlikely that the SEC would ever undertake to [prevent] an annual meeting of stockholders ordered by [a] court,” the court denied debtors’ motion and thereby permitted a shareholders’ meeting where the debtor failed to disseminate either a proxy statement or an information statement. Id. at 982. Unlike in Newcastle Partners, this Court has not issued an order directing debtors to hold its annual

meeting. Further, a shareholders' meeting has already been scheduled by the Debtors for May 17, 2007. Therefore, to the extent that the ruling in Newcastle Partners creates a general exception to the Regulation 14C rules, it is inapplicable to the situation currently before the Court.

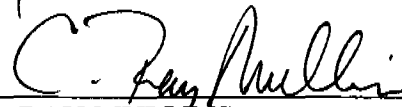
Similarly, Esopus Creek Value involves a different factual situation than the current matter. In that case, a Delaware corporation was seeking to sell substantially all of its corporate assets, but was prohibited from doing so by state law unless the company held a shareholders' meeting. Esopus Creek Value L.P. v. Hauf, 913 A.2d 593, 599 (Del. Ch. 2006). Like Newcastle Partners, the corporation was several years delinquent in filing audited financial statements. Because of this delinquency, the corporation declared bankruptcy once the asset sale agreement was signed and thereafter sought approval of the sale from the bankruptcy court without a meeting and without a vote by the stockholders. Esopus Creek Value L.P. v. Hauf, 913 A.2d at 596. Finding the corporation's actions "theoretically legal, yet undeniably inequitable", the Court of Chancery of Delaware entered an order prohibiting the debtor corporation from making any agreement to sell the assets of the company, unless the corporation's common stockholders approved, as required by Delaware law and the company's certificate of incorporation. Id. at 597, 605. The court further ordered the corporation to fully comply with Delaware law in giving of notice and distribution of basic information required for an informed vote. Id. at 597. Because the court was concerned that a shareholder meeting would be suspended indefinitely, the court anticipated that the corporation would seek an *ad hoc* exemption from the SEC regarding compliance with section 14(c). Id. at 597, 606. Like Newcastle Partners, Esopus Creek Value supports an exception to the Regulation 14C rules when strict compliance would result in an indefinite delay in convening a shareholders' meeting. However, the Esopus Creek Value exception appears even more narrow than any exception created in Newcastle Partners in that it requires first seeking an *ad hoc* exemption from the SEC.

Thus, any exception created by Esopus Creek Value is inapplicable to this case as the Court is neither aware an *ad hoc* exemption has been sought nor is there a concern that the shareholders' meetings are indefinitely delayed at this time. Accordingly,

IT IS ORDERED that the Motion be and is hereby **DENIED** to the extent it requests AHI to convene shareholders' meetings without complying with 17 C.F.R. section 240.14(c).

The Clerk's Office is directed to serve a copy of this Order upon the Debtors, Debtors' Counsel, the United States Trustee, and all other parties in interest.

IT IS SO ORDERED, this 19 day of April, 2007.



C. RAY MULLINS
UNITED STATES BANKRUPTCY JUDGE